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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-30

WILLIAM A. EGAN, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on four counts of having wilfully failed to file income tax returns, in violation of 26 U.S.C. Section 7203. He was sentenced to concurrent prison terms of three months on each count and fined $3,000.

Petitioner appealed to the United States Court of Appeals for the Second Circuit which affirmed (459 F.2d 997). Taxpayer petitioned this Court for a Writ of Certiorari. The United States filed a memorandum in opposition.

The United States, in its memoranda in opposition to the petition herein on page 1 thereof, states that: "it was stipulated that petitioner had sufficient income in each of the four prosecution years (1964-1967)" to make him liable to the filing requirements (Tr. 50; Government Exs. 14, 15,

16). The stipulation actually established that petitioner had income in excess of $600 for the years 1960 through 1967, did not file federal income tax returns for those years, and did file for extensions of time in which to file on three different occasions during those eight years (Tr. 50; Government's Exs. 14, 15, 16).

The government, on page 2 of its memoranda, states that petitioner claimed to "Internal Revenue Service agents during their investigation that he had not been required to file returns from 1960 through 1963 because he had lost money during those years (Tr. 137)." This account was contradicted by petitioner in his testimony (Tr. 105, 106, 109), but more importantly, it was contradicted by the Government's Exhibits, 14, 15 and 16, which were stipulated into evidence (Tr. 50) and consisted of applications by petitioner for extensions of time to file his 1960, 1961 and 1964 federal income tax returns (Tr. 69, 70), hardly proof that petitioner felt he lost money and did not have to file income tax returns.

The government then proceeds to claim that petitioner never asserted a fear of self-incrimination during the course of the investigation. Again, there was a variance between the testimony of the government's witness, Special Agent Murphy, and petitioner, but the Special Agent did testify that the fear of self-incrimination had come up at the very first conference with respect to a question on the application for an extension of time to file, which required the applicant to state whether he had filed federal income tax returns for the preceding three years, rather than with respect to the question on the return itself inquiring about the preceding year (Tr. 143-144).

The foregoing is presented to clarify what the transcript of the trial actually revealed. However, if it is the assertion of the government that any statement by petitioner to investigating agents constituted a waiver of the privilege, "it has been uniformly held that a prior disclosure to investigating officials cannot constitute a waiver of the privilege with respect to the same matter in a subsequent legal proceeding. A waiver of the privilege must occur in the same proceeding in which it is sought to be invoked." *United States* v. *Goodman,* 289 F.2d 256, 259 (Cir. 4th—1961), and the cases cited thereunder. And here it was invoked by motion before trial and by timely motions during the trial. As this Court stated in *Marchetti* v. *United States,* 390 U.S. 39, 51, "Petitioner is under sentence for violation of statutory requirements which he consistently asserted at and after trial to be unconstitutional; no more can be required."

1. The government's contention in its paragraph numbered "1" seems to be that *United States* v. *Sullivan,* 274 U.S. 259, and *California* v. *Byers,* 402 U.S. 424, 434, stand for the proposition that even though in this case to claim the privilege in response to the offending questions on the returns in the context in which they were placed would have directly and inexorably subjected petitioner to the substantial risk of criminal prosecution, he was required to do precisely that. But as this Court stated in *Marchetti, supra,* at page 50, "to have required him to present his claim to Treasury officers would have obliged him 'to prove guilt to avoid admitting it.'"

It is submitted that neither *Sullivan, supra,* nor *Byers, supra,* stand for this proposition.

Mr. Justice Brennan, in his concurring opinion in *Marchetti* v. *United States,* 390 U.S. 39, 72 (1968), signified his understanding of the limitations of the *Sullivan* case, *supra,* when he stated "*United States* v. *Sullivan,* supra, make clear that an individual is not exempted by the fact that he may be privileged to refuse to answer some questions, from a requirement, 'directed at the public at large,' of filing an income taxe return *exclusively* containing questions 'neutral on their face.'" (Italics supplied.) The requirement that the return contain *exclusively* questions neutral on their face takes this case out of the *Sullivan* ambit. Requiring the petitioner to state whether or not he had filed an income tax return for the prior year and, if not, the reasons, cannot be considered a neutral question in the context in which it was placed.

Furthermore, this Court in *California* v. *Byers,* 91 S. Ct. 1535, 1545 (1971) limited the scope of *Sullivan, supra,* as well as its finding in *Byers, supra,* when it stated "there is no constitutional right to refuse to file an income tax return or flee the scene of an accident in order to avoid the possibility of legal involvement." Here, answering the questions on the return truthfully or claiming the privilege with respect to the questions, in either case, resulted, not in the "possibility of legal involvement" but directly in, at the very least, a very substantial risk of criminal prosecution of the crimes charged here (Pet. 6).

The *Sullivan* question, "where did you get your money?" or, even, "did you get your money illegally?", can be answered by claiming the privilege because an admission that it applies does not connect the claimant to a specific crime. Nor does it give either a lead or a link to indictment. But, to the question, "do you have possession of a gun? If 'yes,' give the name and serial #," the privilege cannot be

claimed with respect to one having illegal possession of gun without giving the police a lead. The test of content helps administer the test of intent: its measure for allowing a delayed claim is specificity of criminal content. Here, in answer to the question regarding the filing of a return for the preceding year would necessitate a truthful "No" answer, followed by the reasons that petitioner had not filed for the preceding year. The only reason that could truthfully be given to escape a substantial risk of criminal prosecution would be that the taxpayer did not have more than $600 of gross income in the prior year. In this combination form the two questions here really posed the query, "did you illegally fail to file a federal income tax return last year?".

Perhaps an extreme example will illustrate the central issue. Assume a compelled truthful census return contained among its numerous queries "did you kill anyone since the last census through the instrumentality of a motor vehicle or a gun? If 'yes,' give the name and address of the person, the circumstances, indicating date, time and place, and the registration and serial number of the motor vehicle or gun involved." The return is directed at the public at large not at an inherently suspect group. The government's need to know is unquestionable. The question can be answered by all but a few with a "No" answer. A few could answer "yes" and explain the killing by a motor vehicle accident in which they were exonerated or self-defense with a gun in which they were exonerated, and the like, but some could not answer without subjecting themselves to the substantial risk of criminal prosecution, or, for them to claim the privilege in response to the questions, would certainly point the finger and give the government a "lead."

Although the foregoing is an extreme example of the insertion of an incriminatory question, it requires little imagination to visualize the needs of various federal agencies for information and the possibilities of compelled self-incrimination.

Therefore, here, unlike *Sullivan, supra,* the privilege cannot be claimed with respect to the offending questions on the return, and, unlike *Byers, supra,* here there is not merely the possibility of legal involvement but direct, immediate confession of failure to file followed by the reasons, only one of which—earnings of not more than $600 in the prior year—could eliminate a substantial risk of criminal prosecution. Mistake, inadvertence, gross negligence and the life are all questions of fact to be decided on a trial and would not eliminate the substantial risk of criminal prosecution.

The issue has never been decided by this Court and because of its application to the government's increasing need for self-reporting by the citizenry, it should be.

2. The government's citation of *United States* v. *Sullivan,* 274 U.S. 259 with respect to petitioner's second point is inapposite. If petitioner did not have the legal right to claim the privilege as to filing the return then he was legally required to incriminate himself, to risk criminal prosecution and loss of liberty. This being so petitioner contends that the failure to file was under duress and not willful. This defense was alluded to in *United States* v. *Knox,* 396 U.S. 77, 83 (1969) when the late Mr. Justice Harlan stated: "the question whether *Knox's* predicament contains the seeds of a 'duress' defense, or perhaps whether his false statement was not made 'willfully' as required by #1001, is one that must be determined initially at his trial."

To require here, the pre-Marchetti period, as the Trial Judge did, the belief in a legal right in addition to the fear of self-incrimination, as the element negating willfulness, was to require not only a frightened exceptional constitutional lawyer, but one with clairvoyance. Petitioner contends that all that was required to be found by the jury was the real rather than the imaginary fear of self-incrimination, criminal prosecution and loss of liberty.

Here the trial court found the petitioner failed to file because of fear of self-incrimination, criminal prosecution and loss of liberty (Tr. 212, 283). Surely the justifiable excuse in *United States* v. *Murdock,* 290 U.S. 389, 394 (1933), and consequently should have granted petitioner's motion for acquittal (Tr. 200) since there was no question for the jury. Even the self-incrimination clause of the Fifth Amendment itself is a recognition that it is duress to force a citizen to incriminate himself.

3. The government contends that there were no improper sentencing standards used and that consequently the general non-reviewability as enunciated by this Court in *Gore* v. *United States,* 357 U.S. 386, 393, is applicable. By implication it admits that improper sentencing standards warrant review.

However, the trial court based its sentence exclusively on its recited factors (Tr. 304, 305, 307) and then proceeded to enumerate the factors upon which it based its decision: (a) petitioner's good luck and advantages (Tr. 305), (b) the calculated kind of acquisitive crime (Tr. 305), (c) failure to plead guilty (Tr. 307), equation of crimes *mala in se* with crimes *mala prohibita* (Tr. 308), disbelief of the defense of self-incrimination (Tr. 309), the time of raising the defense of self-incrimination (Tr. 309), and the fact

that the Court had made a defense available to petitioner that it doubted ought to have been made available (Tr. 309-310).

The record disclosed that petitioner had taxable income averaging less than $3700.00 for seven of the eight years in which he failed to file (Govt. Exs. 6-13), and that he had literally practiced from his home for a short period (Tr. 65-66), certainly not good luck and advantage. The Trial Court itself found that the reason for non-filing was fear of criminal prosecution, again not an acquisitive crime of calculated type (Tr. 212, 283). Furthermore, if petitioner was to be penalized for raising the defense of self-incrimination he paid a judicially imposed penalty for exercising his constitutionally guaranteed rights. (*Thomas* v. *United States,* 368 F.2d 941 (5th Cir. 1966), for going to trial at all and because the trial judge did not believe his testimony, all condemned as violations of procedural due process in *Scott* v. *United States,* 419 F.2d 264 (CADC 1969).)

Therefore, petitioner contends that procedural due process in the sentencing process has been violated and that this Court has the power to review it. *Townsend* v. *Burke,* 334 U.S. 736 (1948); 8 Moore's Federal Practice, Cipes—Criminal Rules, Section 32.09, pp. (32-118)-(32-129).

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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